FILED
APR 4 1991
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NO. 90-1461 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H. Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

versus

South Central Bell Telephone Co.,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUMMARY OF THE ARGUMENT

1. Postformation conduct unrelated to an employee's right to enforce his/her contract, including discharges or terminations, is not actionable under Section 1981. Moreover, while certain postformation conduct may involve the opportunity to enter into a new contract with the employer or create an opportunity for a new and distinct relation between the employee and the employer and thus be actionable under Section 1981, such conduct as alleged in this case either does not constitute such a contract or the evidence is totally lacking to support this contention.

2. The decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) should be applied retroactively without the necessity of a case-by-case analysis to try to determine why no claim was brought under Title VII. The inevitable result of such a case-by-case analysis would be the argument that some cases warrant retroactivity and some do not, a result that would create chaos on this issue.

3. The Court of Appeals is under no duty or obligation to make a formal inquiry to determine why a suit has been brought under a wrong or improper statutute or to judicially amend the Petition to provide what the Court may deem to be a proper or appropriate statute. Even assuming, arguendo, that there was such an obligation, the ultimate result in the present proceedings would be the same, as reflected in the Trial Court's Findings of Fact and Conclusions of Law.

ARGUMENT

(1) Carter and Jackson were separated from their employment with South Central Bell Telephone Company with a receipt of monetary compensation under VAMAP (Voluntary Accelerated Management Attrition Program) and their claims may be viewed as alleging a "constructive discharge".[1] Notwithstanding the decision of the Eleventh Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (11th Cir. 1990), the language of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) makes it abundantly clear that the protections of 42 U.S.C. Section 1981 do not extend to such postformation conduct as discharge or termination.

> .... it is plain to us that what petitioner is attacking are the conditions of her employment.
>
> This type of conduct, reprehensible, though it be if true, is not actionable under Section 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process. Rather, such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964. .....
>
> Interpreting Section 1981 to cover postformation conduct unrelated to an employee's

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[1] At the time of the actions involved herein, South Central Bell Telephone Co.'s parent company was AT&T.

> right to enforce her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.

Patterson, supra, 109 S.Ct. at 2374.

This Court offered further evidence that Section 1981 is to be narrowly construed, so as to be inapplicable to discharges or termination, in its footnote 6:

> In his separate opinion, JUSTICE STEVENS construes the phrase "the same right .... to make ... contracts" with ingenuity to cover various postformation conduct by the employer. But our task here is not to construe Section 1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to scope of the statutory terms used by Congress. We adhere today to our decision in *Runyon* that Section 1981 reaches private conduct, but do not believe that holding compels us to read the statutory terms "make" and "enforce" beyond their plain and common sense meaning. We believe that the lower courts will have little difficulty applying the straightforward principles that we announce today.

Patterson, supra, at n. 6, 109 S.Ct. at 2377, n. 6.

Counsel for Carter and Jackson also argues that the Court of Appeals was in error in failing to consider the applicability of Section 1981 to Carter and Jackson's postformation contract claims: (1) the "job protection agreement" which arose from a fellow employee's private meeting with supervisory personnel to which Carter and Jackson were not privy and (2) the VAMAP "job termination contract".

Pivotal to Carter and Jackson's argument on this point is the assertion that they were "duped" into signing documentation requesting VAMAP in the first place, that is, they signed up for VAMAP believing there were sufficient numbers of other employees also requesting it and accordingly, they would not be selected under the program. South Central Bell would respectfully submit that the evidence clearly revealed that these employees were well aware that by signing the VAMAP documents, they were indicating their willingness to leave their positions with a significant monetary inducement.

At the initial trial of these claims, a letter which Carter had previously written was introduced which clearly and unequivocably demonstrated that Carter knew that when she signed the VAMAP documents, she would be leaving her position of employment (Defendant's Exhibit No. 1). If additional evidence on this point was necessary, her husband's testimony only further confirmed her knowledge of this situation. Accordingly, South Central Bell disputes the representation now being made to this Court that Carter and Jackson signed up for VAMAP, unaware that they would be selected and believing that by doing so, they were protecting their employment.

Even assuming, however, that their argument has any factual merit, which is denied, the VAMAP documentation

which they signed is not a "new contract" actionable under Section 1981.

First, the evidence failed to establish that the VAMAP form could even be construed to be a contract. It was an expression of interest, on which each employee indicated whether or not they were interested in receiving a monetary inducement to leave their position of employment with South Central Bell. Company managers at the headquarters in Birmingham, Alabama had the option to select from those indicating a willingness for VAMAP a sufficient number to alleviate the existing surplus problem. In all, 31 employees in Petitioners' department took VAMAP, only four of whom were black, and two of these four were Petitioners Carter and Jackson. The VAMAP form was not a contract at all but, even if it were, it was not actionable under Section 1981 as a contract relative to "a new and distinct relation between the employee and the employer. *Patterson, supra,* 109 S.Ct. at 2377.

Insofar as the alleged "job protection agreement" between white employee Barbara Johansen and supervisory personnel, South Central Bell would again take exception to Carter and Jackson's representations as to what the testimony at the trial court revealed. Not only is the subject matter of the meeting between Johansen and her supervisor pure and total conjecture on Carter and Jackson's part, but Johansen specifically and emphatically denied that any job protection assurances or guarantees were made to her in any private meetings with her supervisor. Further, Johansen denied, contrary to the representations made on page 6 of the Petition for Writ of Certiorari, that she ever thanked Carter for "saving her job". In short, there was no evidence of any merit, save Carter and Jackson's unsubstantiated testimony that any private job assurances were ever made to Johansen. Even assuming such assurances were made, which is and has always been denied,

these representations would not be actionable under Section 1981 as a contract made for a "new and distinct relation between the employee and the employer." At most, it would be simply an assurance of continued employment in the same position. The fact that Carter and Jackson allege that they were excluded from such assurances does not convert such assurances to the status of a contractual opportunity from which Carter and Jackson were deprived.

Secondly, VAMAP was not an invitation to enter into a new relationship with the employer but, quite the contrary, an inducement to take a monetary sum to leave the employer.

(2) Petitioner Allen contends that he was terminated as a consequence of and in retaliation for prior EEOC charges which he filed pertaining primarily to a failure to select him for the planning group and his performance evaluations. As set forth hereinabove relative to the discharge claims of Petitioners Carter and Jackson, South Central Bell would respectfully submit that the language of this Court in *Patterson, supra*, makes it clear that Section 1981 is not applicable to such postformation conduct as discharge or termination.

(3) Even though Carter and Jackson filed a charge with the EEOC and received a right-to-sue letter, their counsel made a "conscious choice" (Petition for Writ of Certiorari, page 16) to sue under Section 1981 to seek the greater damages (emotional distress and punitive damages) available under Section 1981 but not Title VII. For this reason, they contend it would be unfair to apply the *Patterson* holding retroactively to them, inasmuch as there was no attempt on their part to avoid the concilitory procedures of Title VII.

This argument, if accepted, would necessitate a case-by-case analysis in each instance in which the retroactivity of

the *Patterson* decision was being considered as to the reasons why the plaintiff chose to file his/her suit under Section 1981 and not Title VII. The result which Carter and Jackson urge would presumably result in non-retroactivity in their case but conceivably retroactive application of *Patterson* in other cases.

However, the language of this Court in *Patterson* demonstrates that the reason why Title VII was not raised is not of pivotal importance. Retroactivity will not depend on the reasons offered as to why an action was brought only under Section 1981 or, conversely, why the action was not brought under Title VII.

> ... In the particular case before us, we do not know for certain why petitioner chose to pursue only remedies under Section 1981 and not under Title VII. See 805 F.2d at 1144, n.; Tr. of Oral Arg. 15-6,23 (Feb. 19, 1988). But in any event, the availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim.

Patterson, supra, 109 S.Ct. at 2375.

In the same vein, Carter and Jackson contend that the Fifth Circuit Court of Appeals was in error in finding that they were similarly situated to Patterson inasmuch as Patterson presumably did not file her suit under Title VII due to expiration of the limitation period while Carter and Jackson's limitation period had not expired; they simply chose not to allege Title VII either in conjunction with or instead of Section 1981.

Nonetheless, this is an argument of form, not substance. Whether the Fifth Circuit in *Lavender v. V & B Transmissions and Auto Repair*, 897 F.2d 805 (5th Cir. 1980)

noted that Patterson filed a Section 1981 action "presumably" because the Title VII limitation period had expired and later, in this case, stated that Patterson filed her action under Section 1981 for "unknown reasons" is of no significance. To the extent that Patterson and Carter and Jackson both filed claims with EEOC but chose to bring their legal actions under Section 1981, they are indeed similarly situated, as found by the Fifth Circuit, for purposes of the application of this Court's rationale in *Patterson* to their claims.

The reason(s) why Patterson and Carter and Jackson chose not to raise a claim under Title VII are not of critical significance to the analysis of the applicability of Section 1981 to their claims of postformation conduct of their respective employers.

Petitioners' counsel further argues that the actions of the Fifth Circuit were in error because the Court's actions "abrogated petitioners' normal pretrial right to amend to show a cause of action." It should be noted that petitioners' counsel has never sought to amend this action to assert a claim under Title VII, either pretrial or post-trial.

(4) Prior to the trial of this matter but after the filing of his initial complaint, Petitioner Allen was terminated. He thereafter amended his complaint to allege a retaliatory discharge and sought relief under Section 1981. The Fifth Circuit Court of Appeals concluded that a discharge is not actionable under Section 1981 but held that, because Allen's previous claims were before the Court under Title VII, his claim of retaliatory discharge would be before the Court under Title VII as well. Petitioner's counsel asserts that even if Section 1981 does not cover Allen's retaliatory discharge, this Court's holding in *Patterson* should not be applied retroactively to the discharge, thereby enabling Allen to seek the more expansive damages under Section 1981.

The rationale for this position is that South Central Bell, by firing Allen "without any attempt whatsoever at conciliation" has thereby "rejected the Title VII process" and should be subjected to an award of Section 1981 damages. In other words, the employer's actions dictate against retroactive application of *Patterson*.

Again, as noted hereinabove, the adoption of this theory would create a situation of retroactivity on a case-by-case basis, that is, in some Section 1981 cases, *Patterson* would be applied retroactively and in others it would not, depending on an analysis of the employer's actions. Counsel for South Central Bell would respectfully submit that once it has been concluded that the *Patterson* decision is entitled to retroactive application, as it should be, it is retroactive as to all cases.

(5) Petitioners argue that even if Section 1981 does not apply to their claims, the Court of Appeals erred in failing to substitute Title VII in place of Section 1981 in their Petition. In other words, Petitioners assert that the Court of Appeals had an affirmative duty to determine whether the Petition stated a cause of action, under Title VII, and to judicially amend the Petition if it were so found.

As this Court noted in *Patterson, supra*, "we do not know for certain why petitioner chose to pursue only remedies under Section 1981 and not under Title VII." *Patterson, supra,* 104 S.Ct. at 2375. Nonetheless, the Court did not engage in a theoretical discussion of other unpled causes of action or theories of recovery nor address whether a Title VII claim would have been timely for purposes of substituting Title VII for Patterson's Section 1981 claims. Such an analysis is no where judicially or statutorily required or mandated. In the face of a similar assertion, Chief Judge Earl O'Connor noted in *Boyd v. Telecable of Overland Park, Inc.*, 752 F.Supp. 388 (D. Kan. 1990):

> When a remedy exists under another statute (such as Title VII) it is not the Court's duty to inquire why suit was brought under the wrong law, or to tortuously stretch Section 1981 to cover the situation.

752 F.Supp. at 391.

Even were this Court to accept Petitioner's argument, a substitution and analysis of their claims under Title VII instead of Section 1981 would not alter the ultimate result, in view of the overwhelming evidence in support of the Trial Court's Findings of Fact and Conclusions of Law.

CONCLUSION

The decision of the United States Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), is applicable to discharges or termination, as well as other postformation conduct unrelated to an employee's right to enforce his/her contract. Consequently, such conduct is not actionable under Section 1981. The decision is also retroactive and, therefore, governs the Petitioners' claims in the instant proceeding. The attempt by Petitioners to portray various postformation conduct as a "new contract with the employer" and "an opportunity for a new and distinct relation between the employee and the employer" must fail because such conduct cannot be deemed legally or factually to be a contract and, at least insofar as the alleged secret job protection agreement, the evidence of such agreement, even if it could be construed to be a contract, is entirely speculative and wholly lacking in factual basis.

Finally, if Petitioners chose to bring their action under the wrong law or have cited an inappropriate statutory basis for their claim, it is not the legal duty of the Court to scrutinize their petition and make further inquiry to uncover any legal basis which may support Petitioners' claims and to judicially amend the petition to state this legal authority.

Respectfully submitted,

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